Shuib bin Abdul Samad @ Zainal v Tan Sri Dato Seri Khalid bin Abu Bakar & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-01(A)-388–10 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
6 JUNE 2017

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Administrative Law — Judicial review — Certiorari to quash decision of respondents — Appellant charged under ss 16(a)(B) and 17(a) of the MACC Act 2009 and s 165 of the Penal Code — Appellant convicted for offence under s 165 of the Code — Second respondent dismissed appellant from employment pursuant to reg 33(1) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations') — Appellant filed judicial review and sought order of certiorari to quash decision of second respondent — Whether second respondents breached regs 29(2), 31(1) and 33(1) of the Regulations — Whether second respondent acted in excess of jurisdiction by considering extraneous, irrelevant and prejudicial matters in breach of reg 31(1) of the Regulations — Whether second respondent failed to give appellant opportunity to mitigate punishment — Whether second respondent's decision making process tainted with procedural impropriety — Public Officers (Conduct and Discipline) Regulations 1993 regs 29(2), 31(1) & 33(1)

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The appellant filed an application in the High Court for judicial review seeking for an order of certiorari to quash the decision of the Police Service Commission ('the second respondent') in dismissing him pursuant to reg 33(1) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). Prior to his dismissal, the appellant was charged for the offences under ss 16(a)(B) and 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') and s 165 of the Penal Code. Nonetheless, the appellant was acquitted and discharged of the two charges under the MACC Act but was convicted and sentenced only for the offence under the Penal Code. At the end of the trial for judicial review application, the High Court had dismissed the appellant's application, hence the present appeal. The appellant submitted that in making the decision to dismiss him, the second respondent: (a) had breached regs 29(2), 31(1) and 33(1) of the Regulations; (b) had acted in excess of jurisdiction by considering extraneous, irrelevant and prejudicial matters; and (c) had failed to give the appellant an opportunity to mitigate on the punishment.

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Held, allowing the appeal with costs:

(1) The fact that the second respondent averred in para 5.6 of the affidavit to 'menerima perakuan tindakan tatatertib' under reg 33(1) of the Regulations would necessarily have entailed the receipt of the documents forwarded pursuant to reg 29(2) of the Regulations. Therefore, there was no error of law or fact in the learned judicial commissioner's finding on the issues concerning regs 29(2) and 33(1) of the Regulations (see para 22).

(2) The issue of the right to mitigate or to make representation on the punishment had been settled in the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 where it was held that there was no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced on rank. Premised on the decision of the above case, there was no merit in the argument of the appellant that he ought to have been given the opportunity to mitigate as to the punishment of dismissal that was meted out against him (see paras 23–24).

(3) Under reg 31(1) of the Regulations, the second respondent was not supposed to consider the MACC charges yet the MACC charges were stated in the dismissal letter which showed that the second respondent had considered the MACC charges in the disciplinary action against the appellant. Based on the wordings of the dismissal letter, the respondents' decision making process had been tainted with procedural impropriety. The respondents had taken into consideration extraneous matters, namely the MACC charges for which the appellant had been acquitted and the procedure was in direct breach of reg 31(1) of the Regulations (see paras 34–36).

[Bahasa Malaysia summary

Perayu memfailkan permohonan di Mahkamah Tinggi untuk semakan kehakiman memohon untuk perintah certiorari bagi membatalkan keputusan Suruhanjaya Perkhidmatan Polis ('responden kedua') dalam membuangnya daripada pekerjaan berikutan peraturan 33(1) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan'). Sebelum pembuangan kerjanya, perayu dituduh bagi kesalahan-kesalahan di bawah ss 16(a)(B) and 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') dan s 165 Kanun Keseksaan. Perayu walau bagaimanapun dibebaskan dan dilepaskan daripada kedua-dua tuduhan di bawah Akta SPRM tetapi disabitkan dan dihukum hanya untuk kesalahan di bawah Kanun Keseksaan. Pada akhir perbicaraan untuk permohonan semakan kehakimann, Mahkamah Tinggi telah menolak permohonan perayu, maka rayuan ini. Perayu berhujah bahawa dalam membuat keputusan untuk membuangnya, responden kedua: (a) telah melanggar peraturan 29(2), 31(1) dan 33(1) Peraturan-Peraturan; (b) telah bertindak melebihi bidang kuasa dengan

mempertimbangkan perkara luaran, tidak relevan dan prasangka; dan (c) telah gagal untuk memberi perayu peluang untuk mengurangkan hukuman.

Diputuskan, membenarkan rayuan dengan kos:

(1) Fakta bahawa responden kedua menegaskan di dalam perenggan 5.6 afidavit untuk 'menerima perakuan tindakan tatatertib' di bawah peraturan 33(1) Peraturan-Peraturan semestinya melibatkan penerimaan dokumen-dokumen yang dikemukakan berikutan peraturan 29(2) of the Peraturan-Peraturan. Oleh itu, tidak terdapat kesilapan undang-undang atau fakta di dalam dapatan pesuruhjaya kehakiman atas isu berkaitan peraturan 29(2) dan 33(1) Peraturan-Peraturan (lihat perenggan 22).

(2) Isu hak untuk mengurangkan atau untuk membuat representasi atas hukuman telah ditetapkan di dalam kes *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 di mana ia diputuskan bahawa tidak terdapat hak berasingan untuk membuat representasi atas hukuman untuk dilaksanakan terhadap pegawai yang akan dibuang kerja atau diturunkan pangkat. Berdasarkan keputusan kes di atas, tidak terdapat merit di dalam penghujahan perayu bahawa dia patut diberi peluang untuk mengurangkan terhadap hukuman pembuangan kerja yang telah dilaksanakan terhadapnya (lihat perenggan 23–24).

(3) Di bawah peraturan 31(1) Peraturan-Peraturan, responden kedua tidak sepatutnya mempertimbangkan tuduhan-tuduhan SPRM tersebut tetapi tuduhan-tuduhan SPRM tersebut dinyatakan di dalam surat pembuangan kerja yang mana menunjukkan bahawa responden kedua telah mempertimbangkan tuduhan-tuduhan SPRM tersebut di dalam tindakan tatatertib terhadap perayu. Berdasarkan perkataan-perkataan surat pembuangan kerja, proses pembuatan keputusan responden-responden telah dicemar dengan ketidakpatuhan prosedur. Responden-responden telah mengambil kira perkara luaran, iaitu tuduhan-tuduhan SPRM yang mana perayu telah dibebaskan dan prosedur adalah pelanggaran langsung peraturan 31(1) Peraturan-Peraturan (lihat perenggan 34–36).]

Notes

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5993.

Cases referred to

Abdul Rahman bin Ibrahim v Pengarah Besar Lembaga Kemajuan Tanah Persekutuan [2010] 5 MLJ 429; [2010] 3 CLJ 152, CA (refd)

Abdul Wahab bin Abdullah lwn Ketua Polis Negara & Satu Lagi [2000] 1 MLJ 212; [2000] 3 CLJ 250, HC (refd)

A *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, HL (refd)
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (folld)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1
B CLJ 405, FC (refd)
Pengerusi Lembaga Tatatertib & Ors v Mohd Azuan bin Aniffa (Civil Appeal No 01(f)-57–11–11 of 2015 (W)) (unreported), FC (distd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 1 CLJ 559, HC (refd)
C *Subramanyam a/l Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor* [2010] 2 MLJ 597; [2010] 2 CLJ 677, FC (distd)

Legislation referred to

D Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012) ss 6, 8(1)
Malaysian Anti-Corruption Commission Act 2009 ss 16(a)(B), 17(a)
Penal Code ss 165, 222
Public Officers (Conduct and Discipline) Regulations 1993 regs 28(6), 29(2),
E 31(1), 33(1), 37, 38
Rules of Court 2012 O 53 r 3(2)
Rules of the High Court 1980 O 14A, O 33 r 2

Appeal from: Application For Judicial Review No 25–23–08 of 2015 (High
F Court, Alor Setar)

Athimulan (Athimulan & Co) for the appellant.
Shamsul bin Bolhassan (Salwa bt Mhd Asrar with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

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Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was an Assistant Superintendent of Police before his dismissal from the Malaysian Police Force. The appellant filed an application in
H the High Court at Alor Setar for judicial review seeking for an order of certiorari to quash the decision of the Police Service Commission ('the second respondent') in dismissing him. His application was dismissed by the High Court.

I **[2]** Aggrieved by the decision, the appellant (who had since died and was substituted by his widow, Norseri Banun bt Morad as his personal representative), appealed to this court. We had unanimously allowed the appeal. We now provide our reasons.

BACKGROUND FACTS

[3] In 2012, the appellant was arrested by the Malaysian Anti-Corruption Commission ('MACC'). He was charged at the Sessions Court at Ipoh for two offences under ss 16(a)(B) and 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). The appellant was also charged for an offence under s 165 of the Penal Code.

[4] On 28 August 2014, the sessions court acquitted and discharged the appellant of the two charges under the MACC Act. The appellant was however convicted on the charge under the Penal Code. He was sentenced with a fine of RM5,000 in default four months imprisonment. Neither the public prosecutor nor the appellant filed any appeal against the orders of the sessions court.

[5] By a letter dated 8 October 2014, Tan Sri Dato Sri Khalid bin Abu Bakar, the Inspector General of Police ('the first respondent') informed the appellant that he had been suspended from work with effect from 28 August 2014.

[6] On 1 April 2015, the second respondent issued a dismissal letter to the appellant pursuant to reg 33(1) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). The letter reads:

> Tuan,
>
> PEMBERITAHUAN HUKUMAN TATATERTIB
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> Dengan hormatnya saya memaklumkan bahawa Suruhanjaya Pasukan Polis di dalam mesyuaratnya yang ke 87 pada 30 Mac 2015 selepas menimbang perakuan tindakan tatatertib di bawah Peraturan 33(1), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berhubung dengan sabitan kesalahan rasuah di Mahkamah terhadap tuan dengan teliti dan saksama telah membuat keputusan seperti berikut:
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> (a) Tuan didapati *bersalah* dan dikenakan hukuman *Buang Kerja* mengikut Peraturan 38(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 kerana telah disabitkan kesalahan oleh Mahkamah Sesyen Khas SPRM Ipoh, Perak pada 28 Ogos 2014 di bawah Seksyen 16(a)(B) Akta Suruhanjaya Pencegahan Rasuah 2009, Seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah 2009 dan Seksyen 165 Kanun Keseksaan dan telah dijatuhkan hukuman DENDA RM5,000.00 atau empat (4) bulan penjara. (Denda dibayar).

[7] The appellant then filed an application for judicial review to challenge his dismissal.

A PROCEEDINGS IN THE HIGH COURT

[8] Before the learned judicial commissioner, the arguments centred on regs 29(2), 31(1) and 33(1) of the 1993 Regulations which provide respectively:

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29 Responsibility of Head of Department if officer is convicted of criminal offence

(1) Where criminal proceedings against an officer result in his conviction and he does not appeal against such conviction, or where his appeal against the conviction has been dismissed or where the Public Prosecutor's appeal against his acquittal results in his conviction, his Head of Department shall immediately obtain a copy of the court's decision from the Registrar, Deputy Registrar or Senior Assistant Registrar of the court by which he was convicted or his appeal is dismissed.

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(2) Upon receipt of the decision referred to in subregulation (1), the Head of Department shall forward it to the appropriate Disciplinary Authority having the jurisdiction to impose a punishment of dismissal or reduction in rank together with the officer's records of service and the recommendation of the Head of Department that —

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(a) the officer should be dismissed or reduced in rank;

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(b) the officer should be punished with any punishment other than dismissal or reduction in rank; or

(c) no punishment should be imposed,

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depending on the nature and seriousness of the offence committed in relation to the degree of disrepute which the conviction has brought to the public service.

31 Consequences of an acquittal

(1) An officer who is acquitted of a criminal charge in any criminal proceedings shall not be subject to disciplinary action on the same charge.

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32 Consideration of Disciplinary Authority in cases of conviction and detention

(1) If, after considering the report, the records of service and the Head of Department's recommendation forwarded to it under subregulation 29(2), the appropriate Disciplinary Authority is of the opinion that —

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(a) the officer should be dismissed or reduced in rank, the Disciplinary Authority shall impose the punishment of dismissal or reduction in rank, as it deems appropriate;

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(b) the offence of which the officer was convicted does not warrant a punishment of dismissal or reduction in rank but warrants the imposition of a lesser punishment, the Disciplinary Authority shall impose upon the officer any one or more of the punishments other than dismissal or reduction in rank as specified in regulation 38 as it deems appropriate; or

(c) no punishment should be imposed on the officer, the Disciplinary Authority shall acquit him. A

[9] It was the case for the appellant that in making the decision to dismiss him, the second respondent: B

(a) had breached regs 29(2), 31(1) and 33(1) of the 1993 Regulations;

(b) had acted in excess of jurisdiction by considering extraneous, irrelevant and prejudicial matters in arriving at the decision to dismiss the appellant; and C

(c) had failed to give the appellant an opportunity to mitigate on the punishment.

[10] In respect of reg 29(2) ('the first ground'), learned counsel contended that the requirement for the Head of Department to forward the appellant's record of service and its recommendation to the second respondent is an essential requirement and a pre-requisite. The Head of Department however had failed to follow the procedure as laid down in reg 29(2) which rendered the decision of the second respondent bad in law. D E

[11] On reg 33(1) ('the second ground'), learned counsel argued that it was incumbent on the second respondent (after receiving the appellant's record of service and the head of department's recommendation) to consider whether the appellant warrants a dismissal or a reduction in rank or a lesser punishment or no punishment at all. However none of these were carried out when the appellant was dismissed. Learned counsel contended that the second respondent's failure to comply with reg 33(1) resulted in the dismissal of the appellant being wrong in law. In this regard, learned counsel relied on the cases of *Abdul Rahman bin Ibrahim v Pengarah Besar Lembaga Kemajuan Tanah Persekutuan* [2010] 5 MLJ 429; [2010] 3 CLJ 152 and *Abdul Wahab bin Abdullah lwn Ketua Polis Negara & Satu Lagi* [2000] 1 MLJ 212; [2000] 3 CLJ 250. F G

[12] As for reg 31(1) ('the third ground'), learned counsel's argument was that the second respondent had taken into consideration extraneous matters in arriving at its decision to dismiss the appellant, namely the two charges under the MACC Act ('the MACC charges') for which the appellant was acquitted. Learned counsel further argued that the decision to consider the MACC charges was in clear breach of reg 31(1). H I

[13] Learned counsel had also submitted that in this case there was neither a show cause letter nor an opportunity given by the second respondent to the appellant to make representation as to the nature and extent of the disciplinary

A punishment. The denial of the right to mitigate, according to learned counsel, amounted to a serious breach of natural justice.

FINDINGS OF THE HIGH COURT

B **[14]** The learned judicial commissioner considered the following authorities on the principles governing a judicial review application:

(a) *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141; and

C (b) *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 1 CLJ 559.

[15] Having alluded to the principles enunciated therein, His Lordship
D dismissed the first ground for the reason that reg 29(2) was not stated in the statement filed by the appellant pursuant to O 53 r 3(2) of the Rules of Court 2012. Alternatively, based on the averment in the respondents' affidavit, the learned judicial commissioner found that there had been compliance with reg 29(2).

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[16] The second ground raised by the appellant was similarly dismissed by the learned judicial commissioner on similar basis as the first ground.

[17] The learned judicial commissioner also did not find favour with
F the submission of learned counsel for the appellant on the third ground. His Lordship found that the cases relied upon by the appellant were different on the facts. He accepted the submission of learned senior federal counsel ('SFC') who relied on *Subramanyam a/l Sannasy v SAC II Syed Alwi bin Syed Hamid & Anor* [2010] 2 MLJ 597; [2010] 2 CLJ 677. Following
G *Subramanyam*, His Lordship stated thus:

> 47. Mahkamah ini tidak bersetuju responden kedua tidak *(sic)* mengambil fakta luaran sebagaimana yang dihujahkan oleh peguam pemohon yang terpelajar. Responden kedua menumpukan mindanya terhadap kesalahan pemohon bagi pertuduhan ketiga iaitu kesalahan s 165 Kanun itu dan bukannya melibatkan
> H pertuduhan pertama dan pertuduhan kedua di mana pemohon telah diputuskan tidak bersalah. Mahkamah ini berpendapat dalam konteks ini tindakan responden kedua tidak bercanggah dengan Peraturan 31(1) Peraturan-Peraturan itu.

[18] On the right to mitigate, the learned judicial commissioner found that
I the appellant need not be given the opportunity or the right to mitigate as decided in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525 and *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405.

[19] The judicial review application was consequently dismissed, hence the appeal.

THE APPEAL/OUR FINDINGS

[20] Before us, learned counsel for the appellant repeated the grounds canvassed in the High Court. For brevity, we do not wish to set out the submissions of learned counsel and learned SFC's reply. Suffice if we state that having considered the submissions and having perused the grounds of judgment, we concurred with the learned judicial commissioner in respect of regs 29(2) and 33(1).

[21] As found by the learned judicial commissioner, compliance with regs 29(2) and 33(1) was evident from the respondents' affidavit wherein the secretary of the second respondent averred as follows (*rekod rayuan* at p 38):

> 5.6 Seterusnya pada 30.03.2015, Responden Kedua telah bersidang dan selepas menerima perakuan tindakan tatatertib di bawah Peraturan 33(1) Peraturan-Peraturan Pegawai Awam (Kelakuan dan tatatertib) 1993 (PPPA 1993) berhubung dengan sabitan kesalahan rasuah di Mahkamah Sesyen Khas SPRM Ipoh, Perak pada 28.08.2014 memutuskan Pemohon dijatuhkan hukuman Buang Kerja berkuat kuasa 30.03.2015.

[22] Regulation 33(1) provides for the consideration of Disciplinary Authority in cases of conviction and detention. Subregulation (1) specifically refers to 'report', 'records of service' and 'the head of department's recommendation' forwarded under sub-reg 29(2). The fact that the second respondent averred in para 5.6 of the affidavit to 'menerima perakuan tindakan tatatertib' under sub-reg 33(1), in our view would necessarily have entailed the receipt of the documents forwarded pursuant to sub-reg 29(2). We therefore found no error of law or fact in the learned judicial commissioner's finding on the issues concerning regs 29(2) and 33(1) of the 1993 Regulations.

[23] As for the right to mitigate or to make representation on the punishment, the issue had been settled in *Utra Badi*. In *Utra Badi*, the first appellant, Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang ('the disciplinary board') had terminated the services of the respondent, Utra Badi pursuant to a disciplinary proceeding conducted under general order 26 of the Public Officers ('Conduct and Discipline) (Chapter D') General Orders 1980 ('the GO 26'). The respondent contended that his dismissal was unjust and that he should have been given an oral hearing prior to the punishment of dismissal being meted out against him. He commenced proceedings against the disciplinary board in the High Court. The High Court decided in his favour. The matter proceeded to the Court of Appeal where it was decided, inter alia, that the respondent had been deprived of his right to

A make representations on punishment. On appeal to the Federal Court, the decisions of both the High Court and the Court of Appeal were set aside. It was held by the Federal Court that there is no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced on rank.

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[24] Premised on the decision in *Utra Badi*, we found no merit in the argument of learned counsel that the appellant ought to have been given the opportunity to mitigate as to the punishment of dismissal that was meted out against him.

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[25] We nevertheless found merit in the submission of learned counsel for the appellant on the issue of breach of reg 33(1). On this issue, learned counsel submitted that the learned judicial commissioner erred in law in failing to consider that the respondents had taken into consideration extraneous, irrelevant and inadmissible charges in arriving at its decision to dismiss the appellant.

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[26] Regulation 31(1) provides that an officer who is acquitted of a criminal charge shall not be subject to disciplinary action on the same charge. To recapitulate, in rejecting the appellant's contention that there was a breach of reg 31(1), the learned judicial commissioner found that although the dismissal letter issued by the second respondent made reference to the MACC charges, 'ia tidak menjejaskan keputusan responden kedua. Responden kedua hanya bergantung kepada sabitan pemohon bagi pertuduhan ketiga ...'. In coming to such conclusion, the learned judicial commissioner stated as follows:

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> 46. Mahkamah ini merujuk afidavit jawapan yang diikrarkan oleh Setiausaha, Suruhanjaya Pasukan Polis di perenggan 11.6 ada menyatakan secara jelas hanya pertuduhan ketiga iaitu kesalahan s 165 Kanun itu dipertimbangkan. Perenggan 11.6 afidavit jawapan berkenaan menyatakan:
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> > 11.6 Telah meneliti hukuman yang sewajarnya dan bergantung kepada kesalahan yang dilakukan. Dalam hal ini setakat sabitan di Mahkamah di bawah seksyen 165 Kanun Keseksaan dan selanjutnya saya sesungguhnya menyatakan bahawa isu undang-undang berhubung dengan hukuman akan dihujahkan oleh Peguam Persekutuan semasa pendengaran.

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[27] With respect, having perused the whole of the respondents' affidavit, except for the one liner reference to the conviction under s 165 of the Penal Code quoted by the learned judicial commissioner above, we found that there was no other averment made by the respondents as regards the dismissal letter. In other words, the respondents offered no explanation why, if the MACC charges were not the subject of the disciplinary action against the appellant, the dismissal letter itself made reference to the MACC charges.

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[28] We therefore found no basis for the learned judicial commissioner to state that 'walaupun surat eksibit 'S4' ada merujuk pertuduhan pertama di bawah s 16(a)(B) Akta SPRM dan pertuduhan kedua di bawah s 17(a) Akta SPRM, ia tidak menjejaskan keputusan responden kedua. ...'. There was no such factual averment made by the respondents.

[29] The learned judicial commissioner had relied on the case of *Subramanyam* where the appellant, a lance corporal in the Royal Malaysian Police Force was charged in court for falsifying documents to release Indonesians detained from the police lock up, an offence under s 222 of the Penal Code. The appellant was convicted and fined. He paid the fine. Consequently, disciplinary action was taken against the appellant whereby he was dismissed. The appellant instituted a civil suit in the High Court seeking a declaration that his dismissal from the police force was wrong in law, null and void and that he was still a police officer. The appellant contended that the decision to dismiss him was null and void as the respondents had wrongly invoked reg 38 of the 1993 Regulations when they should have dismissed him under reg 37.

[30] In *Subramanyam*, the appellant's claim was dealt with by the High Court under O 33 r 2/O 14A of the Rules of the High Court 1980. The High Court considered whether the rights of the appellant were affected by the quoting of a wrong provision in the 1993 Regulations. Having so considered, the High Court dismissed the appellant's suit. The appellant's appeal to this court was also dismissed. On appeal to the Federal Court, Mohd Ghazali Yusof FCJ said at p 688:

> [19] I am of the view that the rights of the appellant, under the circumstances of the instant appeal, were not at all affected by the reference made to reg 38 in the said letter in imposing the punishment of dismissal. The said letter showed that the disciplinary authority acted under reg 37 in deciding to impose the punishment of dismissal. I cannot see how the appellant can be said to be prejudiced when both regs 37 and 38 provide for dismissal as a punishment. The reference made to reg 38 was out of context under the circumstances of the instant appeal but does not affect the validity of the decision of the disciplinary authority in imposing the punishment of dismissal.

[31] The case of *Pengerusi Lembaga Tatatertib & Ors v Mohd Azuan bin Aniffa* Civil Appeal No 01(f)-57–11–11 of 2015 (W) (unreported) (FC), was not cited by the learned judicial commissioner in his grounds of judgment but that case was relied upon by learned SFC in resisting the appeal before us. In *Mohd Azuan bin Aniffa*, the respondent at the material time was a Chief Inspector in the Royal Malaysian Police. The respondent was suspended from service pursuant to reg 28(6) of the 1993 Regulations on the ground that a detention order under s 8(1) of the Internal Security Act 1960 had been made

against him. Subsequently, the respondent was informed by a letter that he was dismissed. The relevant part of the dismissal letter reads:

> Adalah dimaklumkan Lembaga Tatatertib telah menerima laporan dari Ketua Jabatan anda, bahawa anda seorang pegawai awam iaitu Ketua Inspektor 1/14509 Mohd Azuan bin Aniffa dalam Pasukan Polis DiRaja Malaysia dan ketika itu bertugas sebagai Inspektor Unit HRMIS, Jabatan Pengurusan, Bukit Aman telah dikenakan Perintah Tahanan di bawah Seksyen 8(1) Akta Keselamatan Dalam Negeri 1960 selama dua tahun bermula 18 Disember 2006 di Kem Tahanan Kemunting, Taiping, Perak.
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> 2. Pada menjalankan kuasa-kuasa yang diwakilkan oleh Suruhanjaya Pasukan Polis melalui Suratcara Perwakilan Fungsi-Fungsi, Kuasa-Kuasa, Tugas-Tugas dan Tanggungjawab-Tanggungjawab Tertentu PU(B) 441 bertarikh 14.12.2000 dan berdasarkan peruntukan Peraturan 33(1) Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993, Lembaga Tatatertib setelah menimbang laporan, perakuan Ketua Jabatan dan rekod perkhidmatan telah memutuskan anda dijatuhkan hukuman Buang Kerja mengikut Per 38(g) Peraturan-Peraturan yang sama.

[32] The respondent filed an application for judicial review in the High Court seeking an order of certiorari to quash the decision of the disciplinary authority dismissing him from service. The High Court allowed the judicial review application for the following reasons:

> [14] Adalah jelas, berdasarkan fakta dan keadaan yang wujud dalam kes ini, peraturan 28(6) tidak relevan dan tidak terpakai kepada pemohon kerana peraturan ini adalah untuk kes di mana terdapatnya sabitan dalam kes jenayah terhadap pegawai yang berkenaan. Penahanan pemohon di bawah seksyen 8(1) Akta Keselamatan Dalam Negeri 1960 adalah di bawah undang-undang pencegahan ('preventive detention law'). Begitu juga dengan pemakaian peraturan 33(1). Ia adalah juga tidak relevan dan silap kerana peraturan ini adalah untuk kes-kes jenayah dan bukannya untuk kes-kes tahanan di bawah undang-undang tahanan pencegahan.
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> [15] Bagi kes-kes di bawah undang-undang pencegahan, peraturan yang relevan ialah peraturan 33(2) seperti yang telah dipinda. Justeru, apabila responden pertama membuat keputusan untuk membuang kerja pemohon yang ditahan di bawah undang-undang tahanan pencegahan berdasarkan peraturan 33(1), keputusan tersebut adalah berdasarkan peraturan yang salah. Dengan demikian, ia adalah tidak sah dan terbatal.

[33] The decision of the High Court was affirmed by this court. On appeal to the Federal Court, Raus Sharif PCA (as His Lordship then was) said:

> 21. In the present case, there in no doubt that there were errors in quoting the correct regulation in the suspension letter as well as in the dismissal letter. Notwithstanding this, the question is whether those errors are sufficient to vitiate the decision to dismiss the respondent from service. Our answer is in the negative. We are of the view that the contents of the suspension letter and the dismissal letter

were very clear. The respondent was dismissed due to the detention order that was made against him. The suspension letter no doubt quoted reg 28 instead of reg 45 but the contents of the letter had made it explicitly clear that the respondent was suspended as a result of the order made against him under section 6 of the Internal Security Act 1960. In fact, the second paragraph of the suspension letter did refer to reg 45.

22. The same is true with regard to the dismissal letter. We are of the view that the error in quoting reg 33(1) instead of reg 33(2) of the 1993 Regulations did not render the dismissal void and of no effect. The intention of the Disciplinary Authority was to dismiss the Respondent because of the detention order. This is clearly reflected in the dismissal letter which clearly stated that it was 'PEMBERITAHUAN HUKUMAN TATATERTIB ATAS KES PERINTAH TAHANAN'. In any event, both reg 33(1) and reg 33(2) of 1993 Regulations are of similar effect. Since both regulations did not provide for the right to be heard, the end result would be the same.

[34] With respect, we found that the principles in *Subramanyam* and *Mohd Azuan bin Aniffa* were not applicable to the instant appeal. Whilst *Subramanyam* and *Mohd Azuan bin Aniffa* were concerned with the disciplinary authority quoting the wrong provision of the law, in the instant appeal, the challenge was not about the second respondent quoting the wrong provision of the regulation in the dismissal letter. Instead, the challenge was premised on the infringement of reg 31(1). Under reg 31(1), the second respondent was not supposed to consider the MACC charges yet the MACC charges were stated in the dismissal letter as apparent below:

... bahawa Suruhanjaya Pasukan Polis ... selepas menimbang perakuan tindakan tatatertib ... *berhubung sabitan kesalahan rasuah di Mahkamah terhadap tuan* dengan teliti dan saksama telah membuat keputusan yang berikut:

(a) Tuan didapati bersalah dan dikenakan hukuman Buang Kerja ... *kerana telah disabitkan kesalahan oleh Mahkamah Sesyen Khas SPRM Ipoh, Perak pada 28 Ogos 2014 di bawah* Seksyen 16(a)(B) Akta Suruhanjaya Pencegahan Rasuah 2009, seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah 2009 dan seksyen 165 Kanun Keseksaaan ... (Emphasis added.)

[35] Taking the highlighted words as they explicitly appeared above, it would not be preposterous to conclude that the second respondent had considered the MACC charges in the disciplinary action against the appellant. Hence the charges were reflected in the dismissal letter. Considering the MACC charges when the law prohibits the second respondent from doing so cannot possibly be compared to quoting the wrong provisions in *Subramanyam* and *Mohd Azuan bin Aniffa*. Further, whilst no prejudice was found in *Subramanyam* and *Mohd Azuan bin Aniffa* by the quoting of a wrong provision, it cannot be said that the error in treating an acquittal as a conviction would not have tainted the mind of the disciplinary authority and consequently would not have resulted in any prejudice to the appellant.

A CONCLUSION

B **[36]** Given the clear wordings in the dismissal letter, we were constrained to hold that the respondents' decision making process had been tainted with procedural impropriety. The respondents had taken into consideration extraneous matters, namely the MACC charges for which the appellant had been acquitted and the procedure was in direct breach of reg 31(1) of the 1993 Regulations.

C **[37]** In the light of the above, we unanimously allowed the appeal with costs.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar

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